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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-200820

DATE: January 15, 1982

MATTER OF: Aero Products Research, Inc.

DIGEST:

1. GAO will not review affirmative determinations of responsibility unless fraud is alleged on the part of procurement officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied.
2. In the absence of evidence of collusive bidding or prejudice to Government, it was not improper for procuring activity to consider proposals submitted by both seller and buyer of equipment for manufacture of item being procured.
3. Where all offerors were informed by telephone of revisions to technical data and given opportunity to revise or modify their proposals, this constituted negotiation since term negotiate includes oral or written discussion when offeror is given opportunity to revise or modify proposal.
4. Where offeror submitted modification to its proposal offering to conform to all specification changes, with one minor exception, and contracting officer decided to accept offer in spite of minor deviation or exception, but later offeror amended proposal to eliminate minor exception, this did not constitute late offer, but merely upgrading of otherwise acceptable proposal.

Aero Products Research, Inc. (Aero), protests the award of a contract to either Safetech, Inc. (Safetech), or Telex Communications, Inc. (Telex), under request for proposals (RFP) No. DLA100-80-R-1257, issued by the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania, for 19,030 clipboards with lights.

For the reasons detailed below, we deny the protest.

We are advised that there was an urgent need for the above clipboards; therefore, negotiations were conducted pursuant to the authority of 10 U.S.C. § 2304(a)2 (1976), which permits negotiations where there is a public exigency. According to the contracting officer, due to the urgent need for these lighted clipboards, it was necessary to negotiate for accelerated deliveries and the solicitation reserved "the right to make an award on the basis of best delivery rather than low price." Five proposals were received in response to the RFP. Safetech submitted the lowest proposal which had an acceptable delivery schedule. There were two offerors who quoted lower prices, but their delivery schedules were unacceptable. Telex submitted the second low offer with an acceptable delivery schedule. While Aero's best and final offer met the delivery requirements, its price was the highest price offered. Following an affirmative preaward survey, the contracting officer determined that Safetech's offer was fair and reasonable. Contract No. DLA100-81-C-2246 was awarded to Safetech. We have been advised that contract performance was completed on schedule.

Initially, the basis for Aero's protest was that Safetech would be unable to manufacture and deliver the clipboards in the quantities and timeframe required by the solicitation. Also, Aero objected to an award being made to Telex on the grounds that Telex was in the process of selling its tooling for the manufacture of the clipboards to Safetech. Aero views the submission of bids by both the purchaser and seller of the tooling, while the purchase was still being negotiated, as being somehow improper or illegal.

Subsequent to the receipt of (1) a report prepared by the procuring activity in response to the protest and (2) information obtained pursuant to a request under the Freedom of Information Act, Aero raised the following additional objections to the award:

1. Aero contends that the Government stated in the report that it is willing to accept commercial lighted clipboards

which are not in conformity with the solicitation. In this connection, Aero states that not all offerors received notice that commercial clipboards were acceptable, nor were all of the offerors notified that they could supply clipboards which did not adhere strictly to the specifications;

2. Aero takes issue with the contracting officer's statement that negotiations were conducted with all five offerors;
3. Aero states that the contracting officer determined, prior to concurrence by DPSC Supply Operations Division, that accelerated deliveries were necessary;
4. Aero contends that not all offerors were, as was Safetech, given a waiver of the provisions of the first article testing requirement;
5. The Government accepted a late offer by Safetech; and,
6. Aero alleges that the Government admitted that even should Safetech purchase Telex's tooling, it would not be able to perform in accordance with specifications.

Concerning Aero's contention that Safetech would be unable to manufacture and deliver the clipboards in the quantities and timeframe required by the solicitation, the contracting officer made an affirmative determination that Safetech was a responsible contractor. It has long been the position of this Office that we will not review protests against affirmative determinations of responsibility unless fraud is alleged on the part of the procurement officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Maxton Lock Company, Inc., B-200469, February 4, 1981,

81-1 CPD 66. Neither exception is involved in the present case. However, as noted earlier, Safetech did perform the contract on schedule.

In regard to Aero's allegations that it was improper or illegal for the procuring activity to consider proposals from both the seller (Telex) and the buyer (Safetech) of the tooling to make the product to be manufactured under the instant solicitation, Aero has not specified the exact reason why both proposals could not or should not be considered. Aero does not contend that Safetech and Telex engaged in collusive bidding, nor is there any evidence of record to indicate that such was the case. Therefore, we are unable to conclude that the procuring activity acted improperly by considering the proposals of both Safetech and Telex.

Concerning Aero's contention that the Government stated that it was willing to accept commercial lighted clipboards, we can understand how Aero might have arrived at this conclusion from the contracting officer's statement in the report. In that report, the contracting officer stated that;

"Given that Telex had available, acceptable, already manufactured commercial lighted clipboards, Safetech was found to have the ability to meet the required delivery schedule during the period of transition when Safetech was installing Telex's inventory and equipment."

However, in the supplemental report, the contracting officer categorically denies that commercial lighted clipboards were acceptable, stating that the item being procured was a specification item with only those specific deviations enumerated in the RFP, as amended, and that all offerors were notified of these deviations. This coupled with the fact that there is no evidence of record to indicate that Safetech offered or furnished clipboards which did not conform to the specifications, leads us to the conclusion that the Government did not offer to accept commercial clipboards.

In regard to Aero's allegation that negotiations were not conducted with all five offerors, according to the contracting officer, each of the five firms submitting proposals was telephonically apprised of additional revisions made to the technical data and given an opportunity to revise or modify its proposal. Under 10 U.S.C. § 2304(g) (1976), oral or written discussions with all responsible offerors are required. In 51 Comp. Gen. 479 (1972), we held that the term "negotiate" included the conduct of written or oral discussions and that discussions have been held if an offeror, as in the present case, has been afforded an opportunity to revise or modify its proposal.

Concerning Aero's contention that the contracting officer determined, prior to concurrence by the DPSC Supply Operation Division, that accelerated deliveries were necessary, we are advised by the contracting officer that such concurrence is not necessary and we find no reason to disagree with the contracting officer.

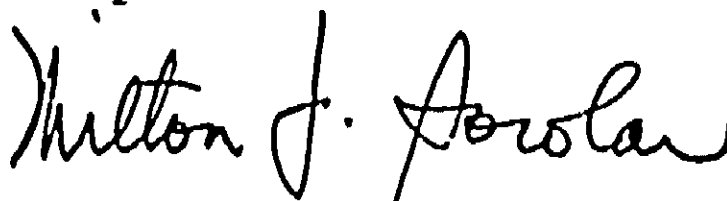
Regarding Aero's contention that not all offerors were given a waiver of the first article testing requirement, as was Safetech, the record indicates that Safetech was not granted a full waiver, but only a waiver for the first 3,000 units. These units were to be furnished by Telex, which had previously furnished acceptable similar supplies. It was determined that Safetech would have to furnish first article samples for those items which it actually manufactured. The solicitation provided that any offeror who had previously furnished to the Government supplies identical with or similar to those being procured could obtain a waiver of the first article testing requirement. We believe that under the circumstances, the waiver granted was a proper exercise of administrative discretion.

Concerning the allegation by Aero that the Government accepted a late offer from Safetech, the record indicates that a telegram providing for technical changes and revised delivery requirements was sent to all of the offerors. Safetech's timely response confirmed its intent to perform, with one exception, in accordance with the specification changes set out in the telegram. This exception was Safetech's statement that the "first 600 units delivered

will not have contract number on lower clip assembly." The contracting officer determined that the effect of this nonconformance was so minimal as to have afforded no competitive advantage to Safetech nor have any possible effect on the outcome of the award selection. See Optimum Systems, Inc., B-194984, July 16, 1980, 80-2 CPD 32. Later, but before award, Safetech offered, at no cost to the Government, to silk screen the contract number and the statement of United States Government Property on the first 600 units to be delivered. Aero has characterized this proposal as a late offer. The contracting officer states that he was prepared to accept an offer on these items without the contract number and United States Property identification and that the proposal to provide the number and identification amounted to nothing more than an upgrading of an acceptable offer, a conclusion with which we agree.

Finally, in regard to Aero's allegation that the Government admitted that even should Safetech purchase Telex's tooling, it would not be sufficient to enable Telex to perform in accordance with specifications, the contracting officer states that a thorough review of all pertinent documents revealed no information that could be construed as suggesting such an admission. Moreover, this appears to be in the area of the affirmative determination of responsibility which our Office will not review.

Accordingly, Aero's protest is denied.

for 
Comptroller General
of the United States